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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA,
Petitioner,

VS.

ROBERT L. DOWELL, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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PETITIONER'S REPLY BRIEF

The presence of a significant dispute between the Tenth, Fifth and Fourth Circuits on the aftereffect of a unitary declaration is widely documented in scholarly commentary and even acknowledged by the Tenth and Fifth Circuits. Respondent's position that a true conflict does not exist is premised on the incorrect notion that something less than a "true determination of

'unitary status' " was reached when the district court terminated this case in 1977. Brief in Opposition at 21.

It is important to remember that the district court's approval of the Finger Plan in 1972 was a full and complete remedy. It was not a "step at a time" plan by definition incomplete at inception, *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 435 (1976). Rather, it was a comprehensive plan which the district court found would create a "unitary system" and remain in place "until it [was] clear that disestablishment of the dual system was complete." *Dowell v. Board of Education of Oklahoma City Public Schools*, 338 F. Supp. 1256, 1271 (W.D. Okl.), *aff'd.*, 465 F.2d 1012 (10th Cir.), *cert. denied*, 409 U.S. 1041 (1972). It is thus the law of this case that the Finger Plan established a racially neutral and constitutional method of student assignment. *See e.g., Spangler v. Pasadena City Board of Education*, 611 F. 2d 1239 (9th Cir. 1979) (Kennedy, J. concurring).

Several years later the school board filed a motion to close the case alleging it "[had] eliminated all *vestiges* of state-imposed racial discrimination in its school system, and [was] operating a *unitary* school system." *E.g., Dowell*, 606 F. Supp. 1548, 1551 (W.D. Okl. 1985) (emphasis added). Plaintiffs filed a response opposing the board's motion. After proper notice, the district court conducted a hearing "to receive the evidence of both the plaintiff and defendant concerning the state of desegregation in the Oklahoma City Public Schools." Brief in Opposition, App.1a. The court "carefully reviewed this evidence and all of the reports it ha[d] received from the defendant and the Biracial Committee since the inception ... of ... the Finger Plan." *Id.* at 2a.

Following the evidentiary hearing, the court entered an order on January 18, 1977, finding that the Finger Plan "was indeed a plan that worked and that substantial compliance with constitutional requirements ha[d] been achieved." *Id.* The court found that a "unitary system" had been "slowly and painfully accomplished over the 16 years during which the cause ha[d] been pending." *Id.* "Now sensitized to the constitutional implications of its conduct and with a new awareness of its responsibility to citizens of all races," the court said, "the board is entitled to pursue in good faith its legitimate policies without the continuing constitutional supervision of the court" *Id.* at 3a. The "Order Terminating [the] Case" dissolved the Biracial Committee and "terminated" all further "jurisdiction" in the case. *Id.* at 4a. Therefore, contrary to respondent's position, Brief in Opposition at 23, the district court in *Dowell* did find "unitary status" had been achieved "only [after] a careful hearing and review of all aspects of [the board's] operations to insure that all vestiges of prior discrimination ha[d] been extirpated."

More importantly, plaintiffs did *not* appeal any part of the "Order Terminating Case." The unitary declaration thus became final. Eight years later, when respondents sought to collaterally attack it in their challenge to the K-4 neighborhood school plan, the district court found it preclusive:

> ... [T] his court's finding in 1977 that a *unitary system* had been achieved by the Oklahoma City Public Schools is *res judicata* as to those who were then parties to this action ... There has been no showing in this case that the

> original plaintiffs did not validly and fairly represent all those whose rights are concerned here. The present [respondents] are, therefore *collaterally estopped* from relitigating the issue of the unitary character of the Oklahoma City Public Schools as of 1977 . . .

Dowell, 606 F. Supp. 1548, 1555 (W.D. Okl. 1985) (emphasis added).

In their zeal to attempt to distinguish this case from *Riddick* and *Overton*, respondents have palpably misstated the court of appeals' view on the original unitary finding in *Dowell*. The court did not simply view the unitary finding as a "lightly applied" label, Brief in Opposition at 23, without significance. Rather, the court of appeals *agreed* with the district court that the school district achieved unitariness in 1977 and that the finding was preclusive:

> When, five years later, the court determined that the implementation of the Finger Plan had resulted in *unitariness* within the district, that finding became *final*, and it, too, is *binding* upon the parties with equal force . . . Thus, . . . the trial court properly refused to permit the plaintiffs to relitigate conditions extant in 1977 . . .

Dowell, 795 F. 2d 1516, 1522 (10th Cir.), *cert. denied*, 107 S.Ct. 420 (1986) (emphasis added).

Respondent's position that no conflict is present because "[i]n *Riddick* and *Overton* the parties' consent to the 'unitary' finding was treated as controlling," Brief in Opposition at 15, 17-18, is likewise incorrect. In *Riddick* the Fourth Circuit actually ruled that since the district court "made findings on the merits of the plaintiffs' claims for relief, the order [wa]s not a consent order in settlement of a suit but [wa]s an order on the merits . . ." which became "final" and preclusive with respect to the issue of unitariness. *Riddick v. School Board of City of Norfolk*, 784 F. 2d 521, 530 (4th Cir.), *cert. denied*, 107 S.Ct. 420 (1986). Similarly, in *Overton* the Fifth Circuit recognized that "the district court entered an order declaring AISD unitary and dismissing the case." *U.S. v. Overton*, 834 F. 2d 1171, 1174 (5th Cir. 1987). This order, the court held, constituted "a final declaration that the school district [wa]s unitary." *Id.*

Therefore, it is conclusive that a final declaration of unitary status was present in *Dowell*, *Riddick*, and *Overton*, and that respondents' attempt to distinguish these cases on this basis is completely misdirected. The conflict between the circuits was born when *Dowell* reached conclusions opposite to those reached in *Riddick* with respect to the *consequences* of a final declaration of unitary status.

The Fourth Circuit in *Riddick* concluded the final declaration of unitary status meant the board was "no longer under court order," 784 F. 2d at 525, and that it "returned control of the city's schools to the school board," *Id.* at 538. Thus, those challenging the neighborhood school plan shouldered the burden to prove the school board adopted the plan "with an intent to discriminate on the basis of race." *Id.* at 534.

In *Dowell*, the Tenth Circuit could not distinguish *Riddick*. It stated *Riddick* "seems to treat a district court order terminating supervision as an order dissolving a mandated integration plan, despite the absence of a specific order to that

effect." 795 F. 2d at 1520 n.3 (1986). The Tenth Circuit therefore concluded that "the Fourth Circuit [in *Riddick*] has taken a *different* view with which we *cannot* agree, . . . A finding of *unitariness* may lead to many other reasonable conclusions, but it *cannot* divest a court of its jurisdiction." *Id.* (emphasis added). Notwithstanding the final declaration of unitary status, the *Dowell* court placed the burden of proof on the school board to justify the neighborhood school plan's racially disproportionate "effect."

The court of appeals in *Overton* could not distinguish the contrary rulings flowing from *Riddick* and *Dowell*. The Fifth Circuit thus recognized that the "Fourth Circuit reached the *opposite* conclusion [of *Dowell*]. . .in *Riddick* . . .," 834 F.2d at 1174 (1987). It then piercingly rejected *Dowell's* approach: "*Dowell's* description of our jurisprudence is *incorrect*," *Id.* at 1175 (emphasis added); "We see *Dowell's* effort to declare a school district to be unitary while retaining jurisdiction as an illusion that denies the essence of unitariness," *Id.* at 1176; "In sum, the idea that a school district can be declared unitary and yet be answerable to federal courts for failure to abide by desegregation plans, regardless of segregative purpose, is at *war* with itself," *Id.* at 117 (emphasis added). The foregoing critique is hardly "*dictum*," Brief in Opposition at 18 n. 31. *Overton* found the decree existing in Austin, Texas was unenforceable for "related reasons." *Id.* at 1174. While it is true the court recognized the decree "expired by its own terms," the court emphasized the important issue was that the decree could not "lie alongside a final declaration that the school district [wa]s unitary." *Id.*

The Tenth Circuit did not simply sit still when criticized by the *Overton* panel. In response, it reiterated that a significant substantive dispute existed among the circuits, *Dowell*, Pet. App. at 16a-17a (1989) ("nor in our view does a finding of unitariness mandate later dissolution of the decree. . .; *Contra. . .Overton*; . . . *Riddick*. . ."), and then beset the Fifth Circuit, *Id.* at 17a n. 17 (". . .*Overton*, 834 F.2d at 1171, *confuses* a trial court's jurisdiction to enforce its mandatory orders with the concept of finality.") (emphasis added).

This, of course, is not surprising because the Tenth Circuit believes that "an injunction takes on a life of its own and becomes an edict quite independent of the law it is meant to effectuate." *Dowell*, Pet. App at 13a. Indeed, the Tenth Circuit is of the view that the district court's "jurisdiction extends beyond the termination of the wrongdoing." *Id.* Thus, "[t]he condition that eventuates as a function of the injunction [unitariness] cannot alone become the basis for altering the decree absent the *Swift* showing." *Id.* A fair reading of *Riddick, Dowell* and *Overton*, therefore, leaves no doubt there is a momentous dispute between the circuits on the significance of unitariness.

The suggestion that there is no substantive conflict among the circuits on the aftereffect of a final unitary declaration is just as misguided as respondents' assertion that the conflict is of no import. Brief in Opposition at 17. The dispute

between the circuits presented for resolution here is of "enormous importance," *Allocating the Burden of Proof After a Finding of Unitariness in School Desegregation Litigation* 100 Harv. L. Rev. 653, 654 (1987), and in fact remains the "most important unresolved issue in the school desegregation area," Note, *Unitariness and Busing: Placing the Burden of Proof for Obtaining Judicial Review When a School Board Stops Busing*, 92 Dick. L. Rev. 437, 441 (1988) (citing N.Y. Times, Nov. 4, 1986, at A27, col. 4).

Respondents' suggestion that the writ should be denied because the dispute is isolated to only *Riddick, Dowell* and *Overton* misses the point. Presently, the equal protection clause of the fourteenth amendment to the United States Constitution is being applied one way in the Tenth Circuit and in an opposite manner in the Fourth and Fifth Circuits. The U.S. Constitution should be uniformly applied to all states in this country based upon this Court's interpretation. Its application should not rest upon the mere fortuity of which circuit a school system happens to be located in. Public education is much too important an institution in America to simply allow the chilling effect of this conflict to remain unchecked.

The point is that every school system in this country involved with desegregation must know what the law is now so they can correctly make important policy decisions in the midst of changing demographics. It is equally important that the law be applied uniformly to all school systems, including the Oklahoma City School System. Granting the writ therefore is completely justified.

Respectfully submitted,

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